The University of the State of New York

The State Education Department
State Review Officer
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No. 16-080

Application of the BOARD OF EDUCATION OF THE MAMARONECK UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Michael K. Lambert, Esq., of counsel

Littman Krooks, LLP, attorneys for respondents, Marion M. Walsh, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the Windward School (Windward) for the 2015-16 school year. The appeal must be sustained in part.[1]

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school

[1] In September 2016, Part 279 of the Practice Regulations were amended, which became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Since the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 do not apply and citations contained in this decision are to the provisions of Part 279 as they existed prior to the September 2016 amendments.

psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the student began attending a district public school for kindergarten (see Tr. p. 34). During first grade in the 2012-13 school year, the student's then-current teacher and his parents raised concerns about the student's "slow and inconsistent" progress, his "ability to connect to instruction," and whether the student had "possible visual and auditory weakness that impact[ed]

his learning" (Dist. Ex. 18 at p. 404).[2] At that time, it was also noted that the student's "[a]ttention" was a concern, and "despite interventions," the student was "below grade level in all academic areas" (id.). As part of the district's prereferral interventions during the 2012-13 school year, the student received academic intervention services (AIS) for reading and mathematics, he participated in a "computer based word study program," and he received response to intervention (RtI) "Tier 1 classroom interventions and modifications including modified assignments, preferential seating, reteaching, redirection and refocusing" (Dist. Ex. 16 at p. 377; see Dist. Exs. 18 at p. 405; 19 at p. 407; 61 at p. 100; Parent Ex. A).

In May 2013, after a referral to the CSE, the district found the student eligible for special education and related services as a student with a learning disability (see Dist. Ex. 3 at pp. 70-71; Parent Ex. B; see also Dist. Exs. 11-16; 18-25).[3] For the 2013-14 school year (second grade), the student's May 2013 IEP included recommendations for daily resource room services;[4] direct and indirect consultant teacher services; occupational therapy (OT); supplementary aids and services, program modifications, and accommodations; and supports for school personnel on behalf of the student ("Enhanced Staffing")[5] (see Dist. Ex. 3 at pp. 70, 79).[6] For the 2013-14 school year, the

[2] The district sequentially numbered the pages throughout most of its exhibits (Bates stamped), rather than sequentially numbering the pages within each individual exhibit. For example, District Exhibit 3 is 12 pages in length, but the first page is identified as page "00070" rather than page "1" and the last page is identified as page "00081" rather than page "12" (see generally Dist. Ex. 3). For clarity, the citations in this decision will refer to the Bates-stamped page number identified in the exhibits, when available, and thus, the first page of District Exhibit 3 would be identified as page "70" in a citation and the last page would be identified as page "81." For those exhibits that do not include a Bates-stamped page number, the citation will refer to the page(s) as counted individually within that exhibit. For example, District Exhibit 60 does not include Bates-stamped pagination—therefore, a citation to the first page would be identified as page "1" (see generally Dist. Ex. 60).

[3] The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute (see 34 CFR 300.8[a][10]; 8 NYCRR 200.1[zz][6]).

[4] At the impartial hearing, the district special education teacher who provided the student with resource room services during the 2013-14 school year testified that she used the Wilson program to address the student's needs in reading (see Tr. pp. 2091-92, 2095, 2100-01, 2107-09).

[5] Although not explained in the May 2013 IEP, the district school psychologist testified at the impartial hearing that the student attended a "supported classroom in second grade," which included staffing of a full-time teaching assistant and a full-time aide in the student's general education classroom (compare Dist. Ex. 3 at pp. 70, 79, with Tr. pp. 82-83).

[6] In June 2013, the parents privately obtained a sensorimotor evaluation and visual processing evaluation of the student (see Dist. Ex. 27 at p. 114). On June 27, 2013, the student began receiving privately provided vision therapy, and thereafter, completed 32 sessions of vision therapy (id.).

student attended a district public school and received special education and related services pursuant to the May 2013 IEP (see generally Dist. Ex. 52; Parent Exs. D-F).[7]

On March 17, 2014, a subcommittee of the CSE (CSE subcommittee) convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (third grade) (see Dist. Ex. 4 at p. 82). Finding that the student remained eligible for special education and related services as a student with a learning disability, the March 2014 CSE subcommittee recommended integrated co-teaching (ICT) services; one 30-minute session per week of OT services in a small group; and testing accommodations (id. at pp. 82, 89-91). In addition, the March 2014 CSE subcommittee recommended the following as supplementary aids and services, program modifications, and accommodations: pre-writing structures; checklists, agendas, and checking in; clearly stated expectations and limit setting; modified homework assignments; clarification of directions; multisensory instruction (one hour per day of multisensory reading instruction); refocusing and redirection; use of specialized paper; and preteaching of new material (id. at p. 89). The March 2014 CSE subcommittee also created annual goals to address the student's needs in the areas of study skills, reading, and writing (id. at p. 88).[8]

For the 2014-15 school year, the student attended a district public school and received special education and related services pursuant to the March 2014 IEP (see generally Dist. Exs. 7-9; 52; Parent Exs. G; I-L).[9] In late September 2014, the district special education teacher in the

[7] At the impartial hearing, the district school psychologist testified that in addition to the special education and related services provided to the student pursuant to the May 2013 IEP, she provided the student with a "building level service"—referred to as "lunch bunch"—for one 30-minute session per week during the 2013-14 school year (Tr. pp. 34-36, 77-81, 86-87). She described "lunch bunch" as a social skills program serving both regular education and special education students in a group no larger than five total students (Tr. pp. 34-36). The "lunch bunch" program targeted specific skills, such as "social-emotional growth, problem solving skills, interpersonal skills, feeling identification, and general social skills around turn-taking, developing friendships, [and] maintaining friendships" (Tr. pp. 34-35).

[8] After the conclusion of the 2013-14 school year, the parents privately obtained a neuropsychological evaluation of the student in July 2014 (see Dist. Ex. 17 at p. 381). Overall, the evaluating neuropsychologist (neuropsychologist) concluded that the student's cognitive abilities fell within the average range (id. at p. 393). Based upon the testing results, the neuropsychologist diagnosed the student as having an attention deficit hyperactivity disorder (ADHD) (predominantly inattentive presentation) and a specific learning disorder with impairment in reading (id. at pp. 393-94). The neuropsychologist also "suggested" that a "future evaluation" of the student would confirm a diagnosis of a language disorder (id. at p. 393). Although it is unclear when the district received a copy of the July 2014 neuropsychological evaluation report, the evidence in the hearing record reveals that, at the parents' request, the district assembled a "team"—which consisted of the neuropsychologist, the parents, the district school psychologist, and the student's then-current regular education and special education teachers for the 2014-15 school year—to attend a "casual meeting" to review the results of the evaluation on September 19, 2014 (Dist. Ex. 26 at p. 113; see Tr. pp. 89-91, 171-72; Parent Ex. S at pp. 1-2).

[9] In a letter dated September 25, 2014, a developmental optometrist recommended that, based upon the "most recent progress evaluation," the student should receive 10 additional sessions of vision therapy to "focus on his accommodation, tracking skills, automaticity, eye-hand coordination, and copying skills" (Dist. Ex. 27 at pp. 114, 117). The student continued to receive vision therapy beginning in late October 2014 (see Dist. Ex. 30 at p. 123). In addition to vision therapy, the parents also privately provided the student with the following services, based in part, on the recommendations included in the July 2014 neuropsychological evaluation report: weekly OT, two 60-minute sessions per week with a reading tutor, and two sessions per week of language therapy (one individual session and one session in a "social group") (see Tr. pp. 826-28, 831-32).

student's ICT classroom began providing him with small group (three students total) reading instruction, which included meeting "several times a week for a guided reading group," as well as the use of a "multisensory program and the Visualizing and Verbalizing program" with the student (Dist. Ex. 28 at p. 118).[10] At that time, the district anticipated providing the student with a reading program for four to five days per six-day cycle (id.).[11]

On or about October 1, 2014, the parents completed the student's application for admission to Windward (see Parent Ex. Z at pp. 1, 8).[12, 13] By letter dated March 10, 2015, the head of the Windward School informed the parents of the student's acceptance to Windward for the 2015-16 school year (see Dist. Ex. 61 at p. 12). On March 16, 2015, the parents executed an enrollment contract for the student's attendance at Windward for fourth grade (2015-16 school year), and sent Windward a tuition payment of $5,000.00 (see Dist. Ex. 60 at pp. 10-12; Parent Ex. AA at pp. 1-2).

On March 27, 2015, a CSE subcommittee convened to conduct the student's annual review and to develop an IEP for the 2015-16 school year (fourth grade) (see Dist. Ex. 6 at p. 304). Determining that the student remained eligible for special education and related services as a student with a learning disability, the March 2015 CSE subcommittee recommended four hours per day of ICT services in the student's classroom; assistive technology (access to word prediction software for writing); supports for school personnel on behalf of the student (one 30-minute session per month of assistive technology consultation services and two 30-minute sessions per month of OT consultation services); and testing accommodations (id. at pp. 304, 312-14). In addition, the March 2015 CSE subcommittee recommended the following as supplementary aids and services, program modifications, and accommodations: refocusing and redirection; checking for understanding; wait time (when responding to a question or given directions); modified assignments; check lists, agendas, and checking in; visual and verbal cues (to enhance comprehension); graphic organizer; and directions clarified (id. at p. 312). The March 2015 CSE subcommittee also created annual goals to address the student's needs in the areas of study skills, reading, and writing (id. at pp. 310-11).

[10] At the impartial hearing, the district special education teacher who provided the student with his small group reading instruction testified that she used "Preventing Academic Failure"—or "PAF"—as the multisensory reading program with the student (Tr. pp. 338-41, 398-400). She also testified that she received "level one" and "level two" training in PAF through Windward (Tr. pp. 340-41). In the 2014-15 school year, the district special education teacher provided the student with his small group reading instruction within the ICT classroom during the second period of the day, which was referred to as "DIP" (differentiated instructional period) (Tr. pp. 399-400, 405, 539-40).

[11] At the impartial hearing, the district school psychologist testified that the student continued to attend the "lunch bunch" program for one 30-minute session per week during the 2014-15 school year (Tr. pp. 35-36, 86-88).

[12] The Commissioner of Education has not approved Windward as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]).

[13] On January 5, 2015, the district—with the parents' consent—modified the student's IEP without convening a CSE meeting to add an annual goal related to OT (see Dist. Exs. 5 at p. 93; 33 at p. 128; 34 at p. 130; 35 at p. 132).

By letter dated May 26, 2015, the parents informed the district school psychologist who had attended the March 2015 CSE subcommittee meeting that after reviewing the March 2015 IEP, they had "serious concerns about this IEP" and noted that it did not offer "sufficient and appropriate support" for the student (Dist. Ex. 42 at p. 144; compare Dist. Ex. 42 at p. 144, with Dist. Ex. 6 at p. 304). The parents indicated that the "only special education services" the district provided were "in the [ICT] class," "[m]ost of [the student's] annual goals remain[ed] the same and he [was] not making appropriate progress" (Dist. Ex. 42 at p. 144). Additionally, the parents asserted that the student was "developing more anxiety about attending school," and that although they "asked about smaller classes and a possible out of [d]istrict placement," the CSE subcommittee "would not consider a more supportive environment" (id.). As such, the parents disagreed with the IEP because the student "clearly" required "more support" (id.).[14]

In an e-mail to the parents dated June 26, 2015, the district responded to the parents' letter dated May 26, 2015 (see Dist. Ex. 45 at p. 148). District personnel explained that since the annual review held on March 27, 2015, the student made "sufficient progress, based on the data collected over the course of his third grade year" (id.). The e-mail confirmed the district's commitment to work with the parents to "support [the student's] educational needs in the upcoming school year" and noted that a "reconvene CSE" meeting had been scheduled for September 1, 2015 (id.).

In a letter dated July 15, 2015, the parents notified the district superintendent of schools that they rejected the student's IEP developed on March 27, 2015 (see Dist. Ex. 44 at p. 146). In addition, the parents reiterated the same concerns about the March 2015 IEP expressed to the district school psychologist in their previous May 2015 letter (compare Dist. Ex. 44 at p. 146, with Dist. Ex. 42 at p. 144). The parents further indicated that the student exhibited "significant learning needs," and he "struggl[ed] for many years, as evidenced by his report cards, goals and other indicia, even though [they] ha[d] supported him with significant private tutoring" (Dist. Ex. 44 at p. 146). According to the letter, although the parents "asked about smaller classes and a possible out of District placement," the CSE subcommittee "would not consider a more supportive environment," and the district's "only response was to offer a CSE meeting on September 1, 2015," which the parents characterized as "too late" to ensure an appropriate program for the student (id.). In light of the foregoing, the parents indicated that the student would attend Windward for the 2015-16 school year and they would seek reimbursement of the student's tuition and all related costs as a result of the district's failure to offer the student a free appropriate public education (FAPE) (id.). Finally, the parents noted that the March 2015 CSE subcommittee did not consider a 12-month school year program for the student or address the student's "regression over breaks" (id. at p. 147). To redress this failure, the parents advised that they had enrolled the student in the "Eagle Hill School Extended School Year Program" (id.). The parents indicated that as a result of the student's enrollment in this summer program, they observed a "significant difference in how a language based learning environment with small classes ha[d] addressed [the student's] needs" and reserved their right to seek reimbursement for the summer program (id.).[15]

[14] On April 16, 2015, the parents informed the district that they engaged the services of a law firm to represent their interests concerning the student's educational needs and requested that the district forward copies of the student's educational records (see Parent Ex. H at pp. 1-3).

[15] During summer 2015, the student attended the Eagle Hill Summer Academic Program (see generally Parent Ex. X).

On July 21, 2015, the parents responded to the district's e-mail dated June 26, 2015 (see Dist. Ex. 45 at p. 148). The parents indicated that they could not attend the September 1, 2015 CSE meeting because it was "not convenient" for them (id.). The parents also noted that "this date [was] too late for [them] to consider changes to [the student's] IEP, as it [was] the first day of school in the school year" (id.). The parents then referred the district to their letter, dated July 15, 2015, which noted their intention to place the student at Windward for the 2015-16 school year, "due to [the student's] failure to make appropriate progress" at the district (id.).

In a letter dated July 22, 2015, the district's assistant superintendent responded to the parents' July 15, 2015 letter in which they described their concerns with the student's 2015-16 IEP (see Dist. Ex. 46 at p. 149). The assistant superintendent advised the parents that although a CSE would be "convened upon the return of staff from the summer break in early September," he, himself, was "available during August" to meet with them to discuss the student's needs and they could contact him if they wanted to meet with him prior to the CSE meeting (id.).

In a separate letter dated July 22, 2015, the assistant superintendent acknowledged receipt of the parents' July 21, 2015 letter in which they notified the district of their intentions to place the student at Windward for the 2015-16 school year and to seek tuition reimbursement (see Dist. Ex. 46 at p. 150). The assistant superintendent informed the parents that the district would convene a CSE meeting "at a mutual date and time when it [was] convenient for [the parents] and staff," and he asked the parents to provide him with "dates [and] times that it would be convenient" for them to attend a CSE meeting (id.).

In a letter dated July 27, 2015, the parents responded to the district's letters dated July 22, 2015 (see Dist. Ex. 47 at p. 151). The parents noted that although they "appreciate[d]" the district's efforts, they had "implored the CSE to offer more support and help" for the student at the March 2015 CSE subcommittee meeting and district staff "stood adamantly against adding any additional services" to the IEP (id.). The parents further noted that the March 2015 CSE subcommittee "decreased" the services offered to the student compared to the previous year, and the CSE subcommittee did not "offer additional specialized reading support and adamantly refused to consider an out of district placement" (id.). Due to the student's "lack of progress, significant struggles and increasing anxiety," the parents asserted that they had "no choice but to seek a more supportive specialized placement" (id.). Additionally, the parents indicated that the district's "proposal of making any changes in September"—after they notified the district of their intentions to remove the student from the district—struck them as "simply an attempt to correct serious deficiencies, which [was] too little and too late" (id.). According to the letter, the parents relied upon the inappropriate program offered in the March 2015 IEP in "making [their] decision to remove [the student] from the District and place him in a more specialized school where [they] anticipate[d] he w[ould] make appropriate progress" (id.). Unsure whether a meeting scheduled after the start of the school year "may or may not address [the student's] learning issues," the parents expressed that such a "haphazard approach to address [the student's] learning [was] a reflection of how the [d]istrict ha[d] treat[ed] [the student] for years and [was] both unreasonable and irresponsible" (id.).

For the 2015-16 school year from September 2015 through June 2016, the student attended Windward (see generally Parent Exs. BB-CC).[16]

A. Due Process Complaint Notice

By due process complaint notice dated "January 5, 2015," the parents alleged that the district failed to offer the student a FAPE for the 2014-15 and 2015-16 school years (see Dist. Ex. 1 at pp. 1, 10-16).[17, 18] Relevant to this appeal, the parents alleged that the March 2015 CSE subcommittee failed to acknowledge the student's "social/emotional needs" and failed to recommend counseling services (id. at pp. 10-11, 13). The parents also alleged that the annual goals to address the student's reading needs in the March 2015 IEP were not measurable or "specific," and the March 2015 CSE subcommittee recommended only one annual goal to address the student's social/emotional needs (id. at pp. 11, 13). Next, the parents asserted that the March 2015 IEP did not provide the student with "sufficient and appropriate support," and instead, included recommendations for ICT services as a "special education service, along with meager OT and [assistive technology] consultations" (id.). The parents complained that "[m]ost" of the annual goals in the March 2015 IEP remained the "same as last year and [the student was] not making appropriate progress" (id.). In addition, the parents asserted that the student "developed more anxiety about attending school" and the March 2015 IEP failed to include social/emotional annual goals or services (id.). Next, the parents contended that although they "inquired as to smaller classes and a possible out-of-District placement," the March 2015 CSE subcommittee "would not consider a supportive environment" (id.). The parents also contended that the March 2015 CSE subcommittee "never considered" a 12-month school year program for the student for summer 2015, "despite his regression during school breaks," and the CSE failed to conduct a "regression analysis" (id. at pp. 12-13). Overall, the parents alleged that the March 2015 CSE subcommittee failed to offer the student a program that was "reasonably calculated to produce educational benefit and [that] addresse[d] [the student's] language and reading deficits and social and emotional needs"

[16] In a prior written notice regarding a "Proposed Reevaluation and Request for Consent" dated September 9, 2015, the district notified the parents of its obligation, pursuant to State regulation, to conduct an appropriate reevaluation of the student (Parent Ex. M at p. 1). The district attached consent forms to the prior written notice for the parents' signature (id. at p. 3). In a letter dated October 6, 2015, the parents acknowledged receipt of the district's request to reevaluate the student, but required additional clarification prior to consenting to the request (see Dist. Ex. 49 at p. 153). In the same letter, the parents declined to access any "District of Location" services for the student (id.; see also Dist. Ex. 48 at p. 152). The parents also questioned why the district sought their consent for reevaluation "now, as [the student's] triennial evaluations [were] not due until April 2016" (Dist. Ex. 49 at p. 153). In a letter dated October 15, 2015, the district provided the parents with the additional information they requested about the student's reevaluation (see Dist. Ex. 50 at p. 154). Later, in a letter dated November 9, 2015, the district provided the parents with additional accommodations related to the reevaluation process; on February 1, 2016, the parents granted consent for the district to conduct a reevaluation of the student, which included a classroom observation, an OT evaluation, and a speech-language evaluation (see Dist. Exs. 51 at p. 156; 61 at p. 24).

[17] It appears that the parents' attorney mistakenly dated the due process complaint notice as "January 5, 2015" rather than "January 5, 2016" (compare Dist. Ex. 1 at pp. 1, 16, with IHO Ex. II; see also IHO Decision at p. 2).

[18] At a prehearing conference held on February 10, 2016, the parents withdrew their requests for relief pertaining to the allegations related to the 2014-15 school year (see IHO Exs. V at pp. 7-8; VI at p. 2). At the impartial hearing, the parents further confirmed that they were "not litigating FAPE" for the 2014-15 school year (Tr. pp. 279-82).

(id. at p. 13). Finally, the parents alleged that the March 2015 CSE subcommittee failed to fully evaluate the student's social/emotional needs and develop an IEP that addressed the student's unique needs (id.).

B. Impartial Hearing Officer Decision

On February 10, 2016, the IHO conducted a prehearing conference, at which time the parents withdrew their "requests for relief relative to the 2014-2015 school year" (IHO Ex. VI at pp. 1-2; see Tr. pp. 279-82; IHO Ex. V at pp. 7-8).[19] On April 12, 2016, the parties proceeded with the impartial hearing, which concluded on September 2, 2016, after eight days of proceedings (see Tr. pp. 1-2208). In a decision dated October 19, 2016, the IHO concluded that the district failed to offer the student a FAPE for the 2015-16 school year, that Windward was an appropriate unilateral placement, and equitable considerations weighed in favor of the parents' requested relief of tuition reimbursement (see IHO Decision at pp. 2, 10-14). The IHO denied, however, the parents' request for tuition reimbursement for the student's summer 2015 program at Eagle Hill (id. at pp. 2, 10, 13).

After a lengthy recitation of the student's educational history, the IHO found that although the student made "gains" during the 2014-15 school year, the student demonstrated "identifiable deficits in coding skills" at the time the March 2015 CSE subcommittee developed the March 2015 IEP (IHO Decision at pp. 4-9 [citing to Dist. Ex. 61: "'Windward School—Test of Coding Skills'"). Moreover, the IHO found that based upon the evidence the student's "independent reading level did not progress beyond level M," and then further noted that the student's "independent reading level reached level N in March 2015 but could not be maintained at level N due to the length and complexity of the texts" (id. at p. 10). Additionally, the IHO noted that "[m]ore specific reading goals on the IEP would not have made a difference" (id.). Thus, the IHO concluded that while the district was "far from indifferent to [the student's] needs," the district failed to offer the student a FAPE for the 2015-16 school year, except for the issue of the district's failure to recommend a 12-month school year program (id.). The IHO concluded that the evidence in the hearing record demonstrated that the student's "'slide' . . . and loss of an academic 'mindset' during the summer months were within the limits of what [was] expectable for most students" (id.).

Next, the IHO found that the parents established that the student's unilateral placement at Windward was appropriate (see IHO Decision at pp. 10-12). Based upon the evidence, the IHO determined that Windward served students with "language based learning disabilities" with "average to superior intelligence" (id. at p. 10). The evidence also revealed that Windward students attended "three periods of language arts instruction each day, one for reading, one for writing, and one for skills" (id. at p. 11). During the "skills period," Windward students learned "strategies for improving decoding, fluency, comprehension, spelling, and writing" (id.). With respect to the student in this case, the IHO found that the evidence in the hearing record demonstrated that from January 2016 through the conclusion of the 2015-16 school year, Windward provided him with "additional reading support of two 1:1 sessions of forty minutes weekly with a teacher, which focused primarily on decoding, spelling and writing" (id.). The IHO further noted that during a classroom observation of the student while in his skills class, he "successfully" participated in all

[19] On or about February 16, 2016, the student began taking medication "on school days to address difficulties with attention" (Dist. Ex. 61 at p. 6).

of the activities and only required "prompting" in one instance from a teacher (id.). Finally, the IHO noted the improvements the student made when comparing his testing results from a spring 2016 administration of the Gray Oral Reading Test with a summer 2014 administration of the same assessment (id. at pp. 11-12). Finding that the student's testing results improved "over time that included the time he attended Windward," the IHO found "for the parents" with regard to the appropriateness of the student's placement at Windward (id. at p. 12).

Turning to equitable considerations, the IHO indicated that the evidence "overwhelmingly support[ed] reimbursement" for tuition and related expenses for the student's attendance at Windward (IHO Decision at p. 12). More specifically, the IHO noted Windward's "close geographical proximity" to the student's home; the student's siblings attended the "same elementary school" the student had attended when the parents applied for the student's admission to Windward and his siblings exhibited "excellent " educational achievement; the "family life was without trauma;" the evidence did not reveal any "ill-advised behavior of either parent in the personal realm that might have contributed to or exacerbated [the student's] scholastic difficulties;" and that when the student attended the district elementary school, the parents were "attentive" to the student's homework (id.). The IHO also noted that the parents "communicated constructively" with the district, met with the student's teachers, and attempted to arrange a "meeting" between district staff and the student's reading tutor (id. at pp. 12-13). Additionally, the IHO found that the parents attended CSE subcommittee meetings, they privately obtained services for the student and did not seek reimbursement for the same, and they shared information with the district (id. at p. 13). Given that the hearing record failed to contain any evidence of "stratagem or subterfuge" or a "hidden or predetermined agenda" seeking "public payment for private school attendance," the IHO concluded that equitable considerations weighed in favor of the parents' requested relief (id.).

IV. Appeal for State-Level Review

The district appeals, and argues that the IHO erred in finding that the district failed to offer the student a FAPE for the 2015-16 school year. The district asserts that, consistent with the IHO's decision, the student made meaningful academic gains during the 2014-15 school year. Accordingly, the educational program offered to the student in the 2015-16 IEP, which was a continuation of the program from the previous school year, was calculated to enable the student to continue to make meaningful academic gains. The district further argues that the IHO erred in finding that the March 2015 IEP failed to offer the student a FAPE because it was not reasonably calculated to improve the student's "decoding skills," which appeared to be the sole basis the IHO relied upon in order to reach this conclusion. The district contends that the IHO's conclusion that the district failed to offer the student a FAPE was "quite simply, inexplicable," and ignored the evidence in the hearing record that conclusively established the student's progress under a similar program. In addition, the district argues that the IHO erred in finding that the parents established that Windward was an appropriate unilateral placement and that equitable considerations weighed in favor of the parents' requested relief. Consequently, the district seeks to overturn the IHO's decision in its entirety.

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's decision in its entirety.[20] The parents assert that in addition to the rationale relied upon by the IHO in concluding that the district failed to offer the student a FAPE, the March 2015 IEP failed to offer the student a FAPE based upon the following grounds: the "ICT class" was not appropriate and did not offer the student appropriate individualized reading support; the March 2015 IEP failed to include a recommendation for counseling services to address the student's social/emotional needs; the March 2015 CSE subcommittee failed to consider the privately obtained July 2014 neuropsychological evaluation of the student, which impeded the parents' "input;"[21] the annual goals targeting the student's reading needs in the March 2015 IEP were "vague" and "not measurable or specific;" the March 2015 IEP failed to include a recommendation for any individualized reading services and no longer included a recommendation for multisensory instruction from a previous IEP; and the March 2015 CSE subcommittee's failure to consider "smaller classes and a possible out of [d]istrict placement"—which the parents inquired about at the meeting—constituted a "[d]eprivation of [p]arental input." Next, the parents assert that the

[20] Since the parents did not cross-appeal or otherwise challenge the IHO's finding that the student was not eligible for a 12-month school year program for the 2015-16 school year or the IHO's denial of their request to be reimbursed for the costs of the student's summer 2015 program at Eagle Hill, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[21] Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *8 [S.D.N.Y. Aug. 27, 2010]). Upon review of the hearing record, it appears that the parents first raised the issue of whether the March 2015 CSE subcommittee failed to consider the privately obtained July 2014 neuropsychological evaluation of the student for the first time at the impartial hearing during the cross-examination of a district witness (compare Tr. pp. 175-77, with Tr. pp. 1-174, 178-2208; Dist. Exs. 1-52; 55-62; Parent Exs. A-M; O; R-U; W-Z; AA-DD; IHO Exs. I-XXXIII), and thereafter, in its post-hearing brief submitted to the IHO and the IHO did not render a finding on this issue (see IHO Ex. XXXIV at p. 22; see generally IHO Decision). Therefore, since the parents did not seek the district's agreement to expand the scope of the impartial hearing to include this issue or seek to include the issue in an amended due process complaint notice, I decline to review the issue. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp. 2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

district's petition must be dismissed for the failure to timely effectuate service of the petition, the failure to properly effectuate alternate service of the petition, and the failure to timely file a copy of the hearing record with the Office of State Review.[22]

In a reply to the parents' answer, the district argues that it timely and properly served the petition for review upon the parents.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-83, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR

[22] The parents submitted a memorandum of law in support of the answer (see generally Parent Mem. of Law). To the extent that the parents or their attorney incorporated or argued additional grounds upon which to conclude that the district failed to offer the student a FAPE for the 2015-16 school year solely within the memorandum of law, the parents and their attorney are reminded that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of the Dep't of Educ., Appeal No. 12-131). State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered" by an SRO, "except a reply by the petitioner to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). Thus, any arguments included solely within the memorandum of law—such as whether the March 2015 IEP failed to address the student's speech-language needs, OT needs, or behaviors that allegedly interfered with his learning; whether the March 2015 IEP failed to document the student's "dyslexia" or address his "language disorder;" and whether the March 2015 CSE subcommittee failed to conduct a speech-language evaluation of the student—have not been properly raised and will not be considered or addressed in this decision (see Parent Mem. of Law at pp. 10-13).

300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

1. Timeliness and Initiation of Appeal

As noted, the parents argue that the district's petition must be dismissed for the failure to timely effectuate service of the petition, or alternatively, the failure to properly effectuate alternate service of the petition. The parents also argue that the district requested the use of alternate service—which the parents further allege the undersigned granted in an ex parte communication with the district—on the last day to effectuate timely service of the petition, namely, November 23, 2016.[23] Upon review, the parents' assertions regarding the timeliness of and the manner in which the district served the petition for review must be dismissed.

To comply with practice regulations in an appeal from an IHO's decision to an SRO, a petitioner must timely and personally serve a verified petition and other supporting documents, if any, upon respondent (8 NYCRR 279.2[b], [c]).[24] Exceptions to the general rule requiring personal service include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by a State Review Officer (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037); or (3) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No. 08-006).[25]

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a], 279.13; see,

[23] In a letter to the Office of State Review, dated November 28, 2016, the parents' attorney leveled the same argument. In response, the undersigned previously explained to the parents' attorney, in a letter dated November 30, 2016, that a decision pertaining to a request to use alternate service—the object of which is to ensure notice of the proceeding and the opportunity to respond—is typically an ex parte process, especially under the circumstances herein when, at the time of the request for alternate service, the district had not yet served a petition for review and therefore, no proceeding had been commenced. As such, this argument will not be further addressed in this decision.

[24] Generally, a petition and supporting documents must be personally served upon a respondent within 35 days from the date of the IHO's decision to be reviewed (see 8 NYCRR 279.2[b], [c]; 8 NYCRR 279.11).

[25] Pursuant to State regulation, "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires" (8 NYCRR 279.1[a]).

e.g., Application of the Dep't of Educ., Appeal No. 12-120 [dismissing a district's appeal for failure to timely effectuate personal service of the petition on the parent]; Application of the Bd. of Educ., Appeal No. 12-059 [dismissing a district's appeal for failure to initiate the appeal in a timely manner with proper service]; Application of a Student with a Disability, Appeal No. 12-042 [dismissing parent's appeal for failure to properly effectuate service of the petition in a timely manner]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing parent's appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]).

Initially, it is undisputed that, based upon the date of the IHO's decision, the last day for the district to timely serve the petition for review fell on November 23, 2016 (see 8 NYCRR 279.2[b], [c]; 8 NYCRR 279.11; see also Answer ¶ 36; Reply ¶ 1). It is also undisputed that the district attempted personal service of the petition for review upon the parents at their residence on four consecutive days from November 15th through November 18th; moreover, the district attempted to personally serve the petition at two different times each day on November 15th, November 16th, and November 17th, albeit at the same two times per day on each date (see generally Dist. Affs. of Service). On November 18, 2016, the district again attempted personal service of the petition at the parents' residence, but on only one occasion (id.). The district's affidavits of service generally described whether cars were parked in the driveway or if, upon ringing the doorbell, no one answered the door (id.). The parents attested, however, that neither the student's mother nor the student's father was at home during any of the district's attempts at service on November 15th through November 18th (see Answer Exs. 1 at p. 1; 2 at p. 1). More specifically, the student's mother attested that she, as a graduate student "seeking an educational degree" was not at home "in the afternoon between 12 and 2:30" on these particular dates (Answer Ex. 2 at p. 1). The student's father attested that he was "not home on November 15, 16, 17, 18, 21, 22, or 23rd" because he worked full time (Answer Ex. 1 at p. 1).

The district next attempted personal service of the petition for review at the parents' resident at 8:00 a.m. on November 23, 2016 (see generally Dist. Affs. of Service). In the affidavit of service related to this attempt at personal service, the process server indicated that "several cars were in the driveway," the process server could "hear talking coming from inside the house," and someone was seen "looking out the window" of the house when he rang the doorbell, but no one answered the doorbell (see generally Dist. Affs. of Service). Following this unsuccessful attempt, the district's attorney sought permission from the Office of State Review, via letter dated November 23, 2016—which the district's attorney sent by copy to the parents' attorney on the same date—to use an alternate form of service, namely "nail and mail."[26] In granting the district's request, the undersigned, via letter dated November 23, 2016, instructed the district to affix a sealed and confidential copy of the petition for review to the door at the parents' place of residence and then mail a duplicate copy of the petition to the parents at their last known address by first

[26] The parents' attorney offered no explanation why she did not oppose the district's request for alternate service upon receipt of the district's letter, dated November 23, 2016, when the district first requested permission on this issue. Rather, the parents' attorney waited until November 28, 2016, to oppose the district's request and thereafter criticized the SRO's decision to grant such request ex parte.

class certified mail, return receipt requested. Based upon a review of the district's affidavits of service, the district completed personal service of the petition for review consistent with these instructions by affixing a copy of the petition for review to the door of the parents' residence on November 23, 2016 at approximately 1:30 p.m., and mailing a duplicate copy of the petition to the parents' last known residence by first class certified mail, return receipt requested (see generally Dist. Affs. of Service; Reply ¶¶ 3-8; Reply Ex. A at pp. 2-4). According to the particular affidavit of service related to alternate service, the process server indicated that he "taped the verified petition to the front door," after noting that he observed the student's mother outside the house (Reply ¶¶ 3-8; Reply Ex. A at p. 3; see generally Dist. Affs. of Service).

With respect to the affixing of the petition to the door of the parents' residence on November 23, 2016, the student's mother attested that she was not at home on that date between approximately 9:00 a.m. and 5:00 p.m., therefore, the statements made by the process server about observing her at home could not be true (see Answer Ex. 1 at p. 1; 2 at p. 1).[27] Additionally, both parents attested that neither knew "what happened to the alleged petition taped to [their] door" on November 23, 2016 (see Answer Ex. 1 at p. 1; 2 at p. 3). Both parents also attested that they received the petition by certified mail on November 28, 2016 (see Answer Ex. 1 at p. 1; 2 at p. 1).

Under the circumstances, even if the parents did not locate a copy of the petition for review affixed to the door of their residence, there is no evidence that the parents' subsequent receipt of the petition via certified mail on November 28, 2016 caused any prejudice to them. Indeed, other than alleging factual inaccuracies with regard to the alternate service (that is, whether the student's mother was home on November 23, 2016 around 1:30 p.m. or whether the process server could see an open garage door from his parked car in front of the residence's front door), the parents do not include any arguments concerning prejudice or how a failure to affix a copy of the petition to the door of their residence affected their ability to fully and properly respond to the allegations in the district's petition, especially where, as here, the parents requested and were granted a specific extension of time in order to prepare and serve their answer in this case.[28] Consequently, the parents' arguments concerning whether the district failed to timely and properly serve the petition must be dismissed.

2. Unaddressed Issues and Scope of Review

Next, a determination must be made regarding which claims are properly before me on appeal. The parents listed several issues in the answer in continued support of their contention that the March 2015 IEP failed to offer the student a FAPE, which the parents raised in the due process compliant notice but which the IHO did not address in the decision: the "ICT class" was not appropriate and did not offer the student appropriate individualized reading support; the IEP failed to include a recommendation for counseling services to address the student's

[27] Notably, the student's mother provided a detailed description of her alleged whereabouts on November 23, 2016 between 9:00 a.m. and 5:00 p.m., but offered no information regarding her whereabouts at 8:00 a.m. on that same date when the district attempted personal service at the parents' residence (see Answer Ex. 2 at pp. 2-3). Additionally, whether the student's mother was or was not at home around 1:30 p.m. when the district's process server attempted the alternate service of the petition is not relevant to this analysis.

[28] While both parents attested that they received a copy of the petition on November 28, 2016, the parents' attorney recounted in her request for an extension to prepare and file an answer that the parents received the petition by certified mail on November 29, 2016.

social/emotional needs; the IEP failed to include a recommendation for any individualized reading services and no longer included a recommendation for multisensory instruction from a previous IEP; and the March 2015 CSE subcommittee's failure to consider "smaller classes and a possible out of [d]istrict placement"—which the parents inquired about at the meeting—constituted a "[d]eprivation of [p]arental input" (compare Answer ¶ 19, with Dist. Ex. 1 at pp. 10-13, and IHO Decision at pp. 1-10).

When an IHO has not addressed claims set forth in the due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013].) Here, although the parents did not affirmatively seek findings from the SRO on the issues listed in the answer or assert that the IHO failed to address these issues, the IHO should have made determinations regarding the remaining issues in the first instance. In the event of an administrative or judicial review, in which the reviewing body might disagree with a singular finding, it is important to have the remaining issues and the rationales addressed, even briefly (cf. F.B., 923 F. Supp. 2d at 589). Also, such an analysis serves as a guide to the district as to whether it should undertake corrective action in the future in order to comply with the IDEA.

However, I am also loathe to remand for further proceedings in this instance, where both the IHO and this SRO ultimately agree that the district failed to offer the student a FAPE, and where the parties developed an adequate hearing record for review of these issues. Adding even more weight in favor of not remanding the case for further proceedings before the IHO is the fact that, to date, the parties have engaged in contentious and, at times, pugnacious behaviors throughout the course of the impartial hearing and subsequent appeal process; thus, remanding for further proceedings may only serve to further encourage the parties to continue in this vein, especially when the parents indicated near the conclusion of the underlying impartial hearing that they may be preparing a case regarding the 2016-17 school year (see, e.g., Tr. pp. 1775-1891, 2054-62, 2195-99). Therefore, the additional alternative findings are provided without any analysis by the IHO who heard the case or the parties' agreement with or challenges thereto.

B. 2014-15 School Year and Progress

Turning now to the merits of the district's appeal, in support of its argument that the IHO erred in finding that the district failed to offer the student a FAPE for the 2015-16 school year the district argues, in part, that the student made progress during the 2014-15 school year as a "direct result of the comprehensive educational program" he received through the special education and services recommended in the March 2014 IEP. The parents generally dispute that the student made progress under the March 2014 IEP, and alternatively, deny that the student made as much progress in reading as argued by the district. As explained more fully below, the evidence in the hearing record supports the district's argument—and as the IHO concluded in the decision—that the student made progress during the 2014-15 school year.

A student's progress under a prior IEP may be a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parent expresses concern

with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. June 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]).

1. Reading

The evidence in the hearing record reveals an administration of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) to the student yielded standard scores of 57 (< 1st percentile rank) in early reading skills, 85 (16th percentile rank) in word reading, and 96 (39th percentile rank) in pseudoword decoding (see Dist. Ex. 16 at p. 378). The evaluator commented that the student presented with an "interesting and inconsistent reading profile," and exhibited difficulty sustaining attention to tasks, attending to and processing visual information, and tracking text during reading activities (id. at pp. 378, 380).[29] In May 2013, the student's first grade teacher reported the student read at an "independent level B" (March of kindergarten), which indicated a deficit of approximately one year (compare Dist. Ex. 11 at p. 352, with Dist. Ex. 55). According to the student's second grade classroom teacher report, in March 2014 the student made a "year's growth in his reading skills" and read at an "end of first grade" level (Dist. Ex. 4 at pp. 82, 85-86).

The March 2014 IEP included recommendations for both ICT services and one hour per day of multisensory reading instruction (see Dist. Ex. 4 at p. 89). According to the district special education teacher, she provided the majority of the student's reading instruction during the first period of the school day, which was scheduled for reading workshop, and during the second period of the school day, which was scheduled for DIP (see Tr. pp. 352-53, 398-99, 405). She described reading workshop as instruction provided in various size reading groups that addressed specific "teaching points" or goals (Tr. pp. 354-55, 400).[30] The district regular education teacher testified that during the 2014-15 school year, she and the district special education teacher provided instruction to the student in a small, guided reading group, in a "strategy group," in one-on-one conferences with both teachers, and in whole group lessons (Tr. pp. 352-53, 398-99, 400, 627-629).

The evidence in the hearing record shows that, in large part, the reading instruction the student received during the 2014-15 school year used multisensory methods. Specifically, the student's regular education and special education teachers testified that a multisensory approach was "infused" throughout the school day, and the student received multisensory reading instruction three to four times per week (Tr. pp. 398-99, 571-72, 630). According to the district school psychologist, the district special education teacher who provided the student's ICT services provided multisensory reading instruction to the student in a small group of no more than three

[29] The evaluator also reported that the student's lowest reading score from the early reading skills subtest may not accurately reflect the student's abilities because the student exhibited a difficult time "shifting from one task to the next" (Dist. Ex. 16 at p. 378).

[30] The district special education teacher testified that the size of the group depended upon the teaching points and the students' needs (see Tr. p. 355).

students (see Tr. pp. 328-29). The evidence hearing record indicated that within the ICT setting, the student's multisensory reading instruction included use of "Preventing Academic Failure" (PAF), which the district special education teacher described as a multisensory approach to teaching encoding and decoding skills (see Tr. pp. 339-40, 398-99, 627-631).[31] The district special education teacher further testified that she provided the student with individual multisensory reading instruction using PAF during the differentiated instructional period (DIP) (see Tr. pp. 398-99, 540). The evidence in the hearing record also shows that in addition to PAF, the district special education teacher used another multisensory approach with the student known as "Visualizing and Verbalizing," which she described as a technique that allowed students to read the words on a page and then visualize what they were reading to target comprehension (Tr. pp. 298, 329, 341-42).[32]

At the impartial hearing, the district's assistant superintendent for curriculum and instruction testified that the district selected the Fountas & Pinnell Benchmark Assessment System (Fountas & Pinnell) to assess students' reading progress at five points throughout the school year (see Tr. pp. 1907-10; see generally Dist. Ex. 55; Parent Ex. Y). According to the district special education teacher, Fountas & Pinnell used nonfiction and fiction books with various levels that increasingly progressed in the "complexity of the texts" in relation to language skills, decoding skills, and comprehension skills (see Tr. pp. 362-63). The evidence in the hearing record reveals that in selecting a reading assessment program, the district internally chose to establish independent reading level benchmarks based on Fountas & Pinnell to assess a student's reading level and progress, rather than using instructional reading levels for each month of the school year for students (see Tr. pp. 381, 1910, 1913-14; compare Dist. Ex. 55, with Parent Ex. Y).[33] The district assistant superintendent for curriculum and instruction further explained in her testimony that the district decided to establish independent reading level benchmarks to assess reading skills—as opposed to instructional reading level benchmarks—"to eliminate the variable of how much teacher prompting and support might be provided" (Tr. pp. 1913-14).

The district special education teacher testified that in using Fountas & Pinnell to assess the student's independent reading skills upon entering third grade in September 2014, it was determined that the student was reading at Level I (end of first grade) (see Tr. pp. 362, 404; compare Dist. Ex. 55, with Dist. Ex. 56 at pp. 217-27). She further testified that by the end of November 2014 and upon assessment using Fountas & Pinnell, the student "passed" independent Level K (March of second grade), he was learning how to decode longer words, and he demonstrated improvements in his comprehension (Tr. pp. 400-01, 404-05; compare Dist. Ex. 55,

[31] The district special education teacher further testified that she used the "Words Their Way" program to evaluate and instruct students in spelling (see Tr. p. 420; see generally Dist. Ex. 57).

[32] In order to deliver instruction using the "Visualizing and Verbalizing" approach (also referred to in the hearing record as the "V&V" approach or methodology), the district special education teacher took part in a two-day training course (Tr. pp. 339-42).

[33] At the impartial hearing, the district's assistant superintendent for curriculum and instruction explained the difference between a student's "independent reading level" and a student's "instructional reading level" (Tr. pp. 1902, 1908-09). In particular, she testified that a student's independent reading level reflected the student's ability to read "independently"—"meaning without prompting" and "without support"—and at a "level of complexity" that the student could "read and comprehend meaningfully" (Tr. p. 1908). Next, she testified that a student's "instructional reading level" represented a "slightly more challenging text that a student c[ould] read but with prompting, support, [and] scaffolding typically [provided by] a teacher" (Tr. pp. 1908-09).

with Dist. Ex. 56 at pp. 228-32). By January 2015, the district special education teacher indicated that the student was reading at a Fountas & Pinnell independent Level L, "engaging in a book," and functioning at an end of second or beginning of third grade level (Tr. pp. 406-10; compare Dist. Ex. 55, with Dist. Ex. 56 at pp. 233-38). According to the March 2015 Fountas & Pinnell assessment, the student achieved 98 percent accuracy and "satisfactory comprehension" at independent reading Level M, and he remained at Level M for the remainder of the school year due to the increased complexity and length of the texts he was reading (Tr. p. 415; compare Dist. Ex. 55, with Dist. Ex. 56 at pp. 239-44). The district regular education teacher testified that the student's progress assessed through the Fountas & Pinnell program from an independent reading Level I (end of first grade) to an independent reading Level M (November-January of third grade) during the 2014-15 school year indicated a "tremendous amount of progress," which was consistent with how she observed the student in his day to day functioning in the classroom (Tr. pp. 631-33; compare Dist. Ex. 55, with Dist. Ex. 56 at pp. 217-44).

In a footnote in the answer, the parents assert that the district's use of an "Independent reading Level Chart [was] misleading and confused." The parents also allege in the same footnote that the district's decision to use independent reading levels (or an "Independent Reading Chart") did not conform with Fountas & Pinnell guidance. In support of these contentions, and as an overall assail upon the student's progress in reading as measured and reported by the district, the parents submitted a copy of a Fountas & Pinnell chart entitled "Progress Monitoring by Instructional Text Reading Level" (Instructional Level chart) into evidence (Parent Ex. Y). On review, the Instructional Level chart documents instructional reading levels that correspond to the level a student could "read with instructional support (e.g., text introduction)" (id.). In this case, the evidence in the hearing record shows that the student's ICT teachers collected data and assessed his reading performance using Fountas & Pinnell, and then applied the results obtained to the district's independent reading level benchmark chart to characterize the student's reading level (see Tr. pp. 378, 391, 404, 414, 1914; compare Dist. Ex. 55, with Dist. Ex. 56 at pp. 217-44). Notably, a review of the parents' Instructional Level chart indicates that generally, a student's independent reading level "will be one or two levels lower" than a student's instructional level; moreover, according to the same document, a student's "independent reading level [was] one at which the student c[ould] read without teacher support" (Parent Ex. Y). Although the district special education teacher testified that she provided "a little introduction" to the text when assessing the student's independent reading level using Fountas & Pinnell, the evidence in the hearing record does not otherwise indicate, contrary to the parents' suggestion, that the district special education teacher "prompted [the student] excessively" and thereby invalidated the district's use of the independent reading level benchmark chart (Tr. p. 381; see Dist. Ex. 55; see also Tr. pp. 1912-13). However, assuming for the sake of argument that the district improperly used an independent reading level benchmark chart after providing the student with an introduction to the text, an analysis of the student's performance during third grade using the parents' Instructional Level chart still demonstrates that the student made progress in reading during the 2014-15 school year (compare Dist. Ex. 55, with Dist. Ex. 56 at pp. 217-44, and Parent Ex. Y). Specifically, the student progressed from a Level I to a Level M during the course of the year (Tr. pp. 362, 415; see generally Dist. Ex. 56), and an application of those same levels to the parents' Instructional Level chart correlates to approximately 12 to 15 months' progress or alternately, from an April of first grade

level (Instructional Level I) to an April to June of second grade level (Instructional Level M) (see Parent Ex. Y).[34]

Aside from the strict application of the parents' Instructional Level chart or the district's independent reading level benchmark chart, the evidence in the hearing record shows that the student demonstrated progress in reading based on other measures, such as his progression through texts of increasing complexity, improved engagement in reading, and progress toward IEP annual goals. For example, the district regular education teacher testified that Level I texts were "very simple short sentences, usually just six to ten words per sentence," whereas Level M texts were often chapter books with multiple characters, scene changes, more developed sentence complexity, and various forms of punctuation (Tr. pp. 634-35). Moreover, the district regular education teacher testified that, for this student and for students generally, moving beyond Level L to texts and short chapter books that were longer and more sophisticated showed that students "really [took] hold of that ownership of reading" (Tr. p. 632). According to the district special education teacher, the student was also learning to decode longer words, improving his comprehension, making connections in his reading, inferring information, reading for longer periods of time, and engaging with a book during independent reading time (see Tr. pp. 401, 407-08). As of June 2015, the student achieved his annual goals in the March 2014 IEP related to applying phonics and word analysis skills to words from content area subjects on an end of second grade level, and, when focused, mastered the annual goal to read 70 words per minute of a third grade level text fluently with accuracy and appropriate rate (see Dist. Ex. 7 at p. 317; see also Dist. Ex. 8 at pp. 338-46).

2. Writing

Here, an administration of a WIAT-III to the student yielded a standard score of 82 (12th percentile rank) on the alphabet writing fluency subtest (see Dist. Ex. 16 at p. 378).[35] When presented with three sequential pictures and asked to write a story describing them, the student "began the story appropriately," but proceeded to write something only "loosely connected" to the second picture (id. at p. 379). With respect to the results of the Test of Early Written Language-Third Edition assessment, the student distinguished between cursive and manuscript writing, defined and identified words and sentences, and spelled one word correctly (id.). According to the evaluation report, the student's spelling was inconsistent, but he "demonstrated control of beginning and ending consonants" (id.). In addition, the evaluation report characterized the student's handwriting skills as weak, noting in particular that he "d[id] not form his letters appropriately" and his letters were "inconsistently sized and spaced" (id.).

To address the student's writing needs, the March 2014 IEP provided the student with daily ICT services and supplementary aids and program modifications, such as pre-writing structures and use of specialized paper for writing assignments (see Dist. Ex. 4 at pp. 86, 89).[36] During the

[34] As compared to the district's analysis of the student's reading level using the independent reading level benchmark chart, which reflected progress from a June of first grade or September of second grade level (Level I) to a November to January of third grade level (Level M) (see Dist. Ex. 55).

[35] The sentences writing subtest of the WIAT-III was administered but not scored, as the student did not follow subtest directions despite clarification (Dist. Ex. 16 at p. 379).

[36] According to the school psychologist, a "pre-writing structure" is usually "a scaffolding exercise" that could include supports such as a graphic organizer or discussion with the teacher prior to writing (Tr. p. 170).

2014-15 school year, the student worked on three annual goals in his IEP related to writing (id. at p. 88; see Dist. Exs. 7 at p. 318; 8 at pp. 320-28). As of January 2015, the student's IEP annual goals progress report indicated that the student correctly spelled weekly spelling words, although he did not always transfer correct spelling into his writing (see Dist. Ex. 7 at p. 318). The report also reflected that the student's ability to write a narrative using details to describe an event was progressing gradually (id.). For the third writing annual goal, the report indicated that the student demonstrated the ability to revise and edit a piece of writing with the support of a teacher, and was working toward exhibiting this skill independently (id.).

3. Mathematics

When compared to the student's needs in reading and writing, mathematics was an area of relative strength for the student (see Dist. Ex. 16 at p. 379). In this area, the WIAT-III results indicated the student achieved standard scores of 93 (32nd percentile rank) in math problem solving and 91 (37th percentile rank) in numerical operations, both of which fell within the average range (id. at p. 378). According to his first grade teacher, the student grasped the "concept of addition," including adding two numbers with accuracy, but he had difficulty with "interpreting word problems with addition and subtraction" (Dist. Ex. 11 at pp. 352-53). According to the March 2014 IEP, the student's classroom teacher reported that he had a "solid understanding of addition and subtraction," was developing a "good understanding of numbers and place value," and was learning "different strategies for adding and subtracting" (Dist. Ex. 4 at p. 86).

At the impartial hearing, the student's regular education teacher from his ICT class testified that the student made progress in mathematics during the 2014-15 school year, and for the most part, was "extremely successful," while receiving the same amount of instruction that "any other third grader would need" (Tr. pp. 637-38). The student's special education teacher testified that although she modified the amount of the student's mathematics work, she did not modify the type of work he was required to complete (see Tr. p. 546). Testimony from both of the student's ICT teachers during the 2014-15 school year demonstrated the student was strong in mathematics computation, and thus, instruction centered on building upon his strengths and providing him with supports, such as repetition and breaking down the process into smaller parts and assisting him with organization (see Tr. pp. 544-45, 637-38).

4. Attention

As part of the student's educational evaluation, the evaluator reported a "consistent" area of the student's profile was his difficulty "staying attentive to tasks" (Dist. Ex. 11 at p. 380). The evaluator noted that the student had "not yet acquired the self-monitoring skills to know that he [was] off task" (id.). The evaluator further noted that the student's inattentiveness in a "classroom setting this c[ould] be quite challenging and have serious implications for learning" (id.). The evidence in the hearing record also demonstrated that the student's "work habits [were] inconsistent," and his attention, focus, and effort were characterized as "weak to emerging," and the student required "teacher support and monitoring for production" (Dist. Ex. 11 at pp. 352-53).

C. March 2015 CSE Process—Parental Participation

The parents argue that the March 2015 CSE subcommittee's failure to consider "smaller classes and a possible out of [d]istrict placement"—which the parents inquired about at the

meeting—constituted a "[d]eprivation of [p]arental input." The parents assert that the March 2015 CSE subcommittee "would not consider a more supportive environment" because out-of-district placements "were reserved for children who were not making adequate progress or who had emotional disturbances." In the memorandum of law, the parents similarly argue that the March 2015 CSE subcommittee failed to consider other placement options, alleging that the CSE subcommittee "categorically rejected" their request for an out-of-district placement with a "smaller ratio, or any state approved private programs" for the student, which deprived them of the right to participate in the decision-making process.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]).[37]

At the impartial hearing, the district school psychologist who attended the March 2015 CSE subcommittee meeting confirmed in her testimony that the parents asked whether "the committee would consider a placement [for the student] out of district in a smaller setting" (Tr. pp. 30-31, 103-04, 126-27). In particular, the district school psychologist recalled that the parents asked about "providing more support" to the student and "whether or not the committee would consider a placement out of district in a smaller setting" (Tr. pp. 126-27; see Dist. Ex. 42 at p. 144). She further clarified that the "parents wanted to have the committee consider placing [the student] in an out-of-district program in a smaller setting to better support his needs" (Tr. pp. 126-27; see Tr. pp. 203, 205-06; see also Tr. pp. 856-57). In response, the district school psychologist indicated to the parents that because the student was "making progress" in his "current program"—which was "at a least restrictive placement for him where it was giving him the appropriate amount of support"—the CSE subcommittee "did not find a need to go out of district, for an out-of-district placement or a smaller setting" for the student (Tr. pp. 127-28). She also testified that no other member of the March 2015 CSE subcommittee expressed or supported the option of "looking for

[37] The IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

an out-of-district placement" for the student, other than the parents, and she understood that the parents were requesting a "more restrictive placement" for the student (Tr. pp. 128, 205-06).

The parents' testimony at the impartial hearing conflicts with the district school psychologist's testimony on this issue. According to the parents, they voiced their disagreement with the March 2015 CSE subcommittee's decision to recommend ICT services for the student at the meeting, noting in particular that they asked for the student to "go back to Wilson," they asked for "multi-sensory instruction," they asked for "smaller group," and they asked for "language services" (Tr. pp. 856-57). The district school psychologist testified that, contrary to the parents' testimony, the parents did not express any disagreements with any of the recommendations in the March 2015 IEP (see Tr. pp. 2065-66, 2088). She also testified, however, that while the parents did not express any disagreements with the March 2015 IEP, the parents did express "a lot of concerns" at the March 2015 CSE subcommittee meeting (Tr. p. 2082).

At the impartial hearing, the parents also testified that when they asked if "there was any possibility of a different placement" or an "out-of-district placement, somewhere where they had a smaller class . . . where it would [have been] better for [the student]," the March 2015 CSE subcommittee "disregarded" their concerns and "didn't recommend anything further" (Tr. pp. 856-57). According to the parents' testimony, the district school psychologist told them that "out-of-district placements were only for people diagnosed with emotional disturbance and that [the student] did not qualify" (Tr. p. 857). Yet, at the impartial hearing, the district school psychologist denied making this statement, and clarified that at the CSE subcommittee meeting, she explained to the parents that "out-of-district placements were reserved for kids that needed a more restrictive setting and children [who] were not making adequate progress in the least restrictive placement" (Tr. pp. 203-04). The district school psychologist also denied telling the parents that there were no out-of-district placements "available" for students with "reading difficulties" (Tr. p. 203). During rebuttal, the district school psychologist testified that the parents did not specifically "ask for an out-of-district placement" for the student, but rather, they "asked direct questions about what . . . programs . . . [were] out of district" and "why" the student would not be "considered for those programs" (Tr. pp. 2082-83).

Relying on these facts, the parents urge a similar conclusion as determined by the court in S.Y. v. New York City Dep't of Educ., 2016 WL 5806859, at *9-*10 (S.D.N.Y. Sept. 28, 2016). In S.Y., the parents argued that the CSE failed to consider whether an 8:1+3 special class setting, as opposed to the recommended 6:1+1 special class setting, was necessary for the student to receive educational benefits (S.Y., 2016 WL 5806859, at *9). The court noted that although both the parents and the student's then-current nonpublic school teacher "expressed to the CSE that [the student] required the support of an 8:1+3 classroom," the district failed to produce evidence sufficient to carry its burden of proof to establish that the "CSE gave due consideration" to an 8:1+3 classroom (S.Y., 2016 WL 5806859, at *9-*10). While noting that the CSE was "not required to adopt the [p]arents' preferred placement," the court held that the CSE "'had an obligation to consider that [the student] needed a more restrictive ratio, and concede that fact if the [district's] public options were unable to meet [the student's] needs'" (S.Y., 2016 WL 5806859, at *9, citing E.H. v. New York City Dep't of Educ., 2016 WL 631338, at *9 [S.D.N.Y. Feb. 16, 2016]). The court in S.Y. further noted that the "only evidence that the CSE responded" to the proposed 8:1+3 classroom ratio indicated that it was "rejected categorically on the ground that the [district] d[id] not offer that ratio in the public schools" (S.Y., 2016 WL 5806859, at *9), and the "IDEA d[id] not permit the categorical rejection of placements outside the public school system"

(S.Y., 2016 WL 5806859, at *10, citing E.H., 2016 WL 631338, at *9; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 257 [2d Cir. 2012]; R.B. v. New York City Dep't of Educ., 2016 WL 2939167, at *8 [S.D.N.Y. May 19, 2016]). Based upon this reasoning, the court ultimately concluded that this "procedural violation significantly impeded the [p]arents' right to participate in the decision[ ]making process by failing even to consider their input on a key component of the IEP; in doing so, the [district] denied [the student] a FAPE" (S.Y., 2016 WL 5806859, at *10).

The IHO, who had the benefit experiencing the testimony in person during the impartial hearing, did not resolve this evidentiary conflict. I accept the testimony from both sides that the parent stated concerns and wanted to discuss out-district-placement options. From there, the available documentary evidence weighs against the district's position. The hearing record included a "Prior Written Notice," dated April 8, 2015, which the district issued in conjunction with the March 2015 CSE subcommittee meeting (see generally Dist. Ex. 41 at p. 143). A review of the IDEA-mandated prior written notice reveals that in the section designated as the "Description of Any Other Options Considered and The Reasons Why Those Options Were Rejected," the district noted the following: "[t]here were no other options considered at this time" (id.), lending support to the parents' testimony that the CSE disregarded their concerns.[38] Similarly, the March 2015 IEP, itself, failed to indicate whether the CSE subcommittee considered any other options for the student (see generally Dist. Ex. 6). While I might have agreed in substance with the sentiments of the school psychologist regarding the student's previous progress, class size, and LRE considerations were I a member of the CSE, in the impartial hearing context such testimony, as it relates to parent participation, is difficult to favor over the parent's view of events when the district's contemporaneous documentation supports the parent's hearing testimony that they did not consider the parent's view, even if the district would not ultimately be required to adopt the parents desires to place the student outside the district whole cloth. Thus, the March 2015 CSE subcommittee committed a procedural violation by failing to discuss other placement options for the student. I need not address just how significant this violation was in terms of the parents' participation or whether such violation, alone, would result in a determination that the district failed to offer the student a FAPE, but note that the violation is added to the substantive denial of FAPE discussed below.

[38] Had the parents raised a similar argument challenging the substantive appropriateness of the recommended ICT services as opposed to the CSE subcommittee's process in reaching that recommendation, the district school psychologist's testimony reflects consistency with at least two federal district courts, which have recognized that when a CSE determines an appropriate setting in the LRE in which the student could be educated, "it was under no obligation to consider more restrictive programs" (B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. Mar. 31, 2014], citing E.F., 2013 WL 4495676, at *15 [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]; see also 20 U.S.C. § 1412[a][5] [requiring CSEs to recommend a placement that would be the "least restrictive environment" for a student]).

D. March 2015 IEP

1. Annual Goals

Although not addressed at any length in the decision, the IHO noted that "[m]ore specific reading goals on the IEP would not have made a difference" (IHO Decision at p. 10). In the answer, the parents continue to press the argument that the annual goals targeting the student's reading needs in the March 2015 IEP were "vague" and "not measurable or specific." An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Here, the March 2015 IEP included four annual goals to address the student's needs in reading (see Dist. Ex. 6 at p. 311). The annual goals aligned with the student's reading needs as described in the present levels of performance by targeting his ability to apply phonic skills and word analysis skills to correctly decode words and multisyllabic words (decoding skills), his ability to read fluently and accurately (reading fluency skills), and his ability to answer text based and inferential questions to demonstrate an understanding of the text (comprehension skills) (compare Dist. Ex. 6 at p. 308, with Dist. Ex. 6 at p. 311). A review of the annual goals reveals that, consistent with State regulations, each of the annual goals addressing the student's reading needs in the March 2015 IEP included evaluative criteria (i.e., 75 percent or 80 percent success over consecutive occasions), an evaluation schedule (i.e., measuring progress every 3 or 5 weeks), and a method for evaluating progress (i.e., reading a word list, running records, or work samples) (see Dist. Ex. 6 at p. 311). Notwithstanding the parents' contentions that the annual goals in the March 2015 IEP were "vague" and not sufficiently "specific," the evidence in the hearing record indicates that the annual goals targeted the student's areas of need in reading and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F., 2013 WL 4495676, at *18-*19; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 334-35 [S.D.N.Y. 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *9 [S.D.N.Y. July 3, 2008]; M.C., 2008 WL 4449338, at *11; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]).

2. ICT Services

Having concluded that the student made progress during the 2014-15 school year, the next issue to address is whether, as the district asserts, the educational program offered to the student in the March 2015 IEP—which was a continuation of the program from the March 2014 IEP that "led to such meaningful gains"—was reasonably calculated to enable the student to receive educational benefits. In contrast, the parents assert that the "ICT class" was not appropriate, and

the March 2015 IEP failed to include a recommendation for any individualized reading services and no longer included a recommendation for multisensory instruction as compared to the student's March 2014 IEP. Upon review, the evidence in the hearing record does not support the district's assertions. As such, the IHO's conclusion that the district failed to offer the student a FAPE for the 2015-16 school year will not be disturbed.

"Although past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (S.H., 2011 WL 6108523, at *10, citing Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153 [10th Cir. 2008]; see also D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011] [determining that evidence of likely progress was "the fact that the [challenged IEP] was similar to a prior IEP that generated some progress"]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011] [finding that when the student made some progress under a previous IEP, it was not unreasonable for the CSE to propose an IEP "virtually identical to" the previous one]; M.C., 2008 WL 4449338, at *16 [determining that when the IEP at issue mirrored a past IEP under which the student "demonstrated significant progress," the IEP at issue was reasonably calculated to afford the student educational benefit]; see generally Application of a Student with a Disability, Appeal No. 12-064; Application of the Bd. of Educ., Appeal No. 11-128).[39] Here, although the evidence in the hearing record demonstrated that the student made progress—and in particular in reading, which is really the gravamen of the parties' dispute—a review of the hearing record does not support the district's argument that the March 2015 CSE subcommittee recommended a continuation of the same program under which the student made progress during the 2014-15 school year. Rather, the evidence in the hearing record supports the IHO's determination that the March 2015 CSE subcommittee's decision to recommend ICT services while eliminating further support in the plan to address the student's continued needs in reading—namely, multisensory instruction in reading—was not appropriate.[40]

As previously noted, the March 2015 CSE subcommittee continued to find the student eligible for special education and related services as a student with learning disability and recommended, among other things, that he receive four hours per week of ICT services in his classroom (see Dist. Ex. 6 at p. 304). The district school psychologist testified that the March 2015 CSE subcommittee reviewed the student's progress on annual goals and reviewed his work samples in making its recommendations (see Tr. pp. 103-07). The district school psychologist also testified that the CSE subcommittee reviewed the student's progress in reading and at that time, his reading level—per Fountas & Pinnell—was a Level L or M, indicating that he had improved by approximately two levels since the beginning of the 2014-15 school year (see Tr. p. 108; Dist. Ex. 6 at p. 308). In describing the student's reading in the March 2015 IEP, the CSE subcommittee noted that the student exhibited "nice progress in his ability to read harder text," "us[ed] more

[39] At least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

[40] In the decision, the IHO found that the student had "identifiable deficits in coding skills," and appeared to rely solely upon evaluative information—the "Windward School-Test of Coding Skills"—not available to the March 2015 CSE subcommittee in making the ultimate determination that the district failed to offer the student a FAPE (IHO Decision at pp. 9-10).

strategies to decode unknown words," "monitor[ed] for understanding as he read[]," and demonstrated "good comprehension at his independent level" (Dist. Ex. 6 at p. 308). However, despite this progress, the March 2015 IEP also indicated that the student continued to read "below grade level expectations," his reading rate was "slow," and his fluency was "choppy," as he tended to "repeat many words and phrases while reading aloud" (id.).

As noted above, contrary to the district's contentions, a review of the March 2015 IEP shows that unlike the March 2014 IEP, it did not include a recommendation for multisensory reading instruction as one of the supplemental aids and services, program modifications, or accommodations (compare Dist. Ex. 4 at p. 89, with Dist. Ex. 6 at p. 312). Notably, the March 2014 IEP included a recommendation for multisensory reading instruction, which the district implemented the during the 2014-15 year and which contributed in significant part to the progress the student made in reading (albeit together with the additional instruction provided during reading workshops and the infusion of a multisensory approach throughout the school day) (see Tr. pp. 398-99, 571-72, 627, 629-31; Dist. Ex. 4 at p. 89). Although the district school psychologist testified that the student continued to need multisensory reading instruction for the 2015-16 school year, she further testified that the March 2015 IEP did not include the same recommendation and was devoid of services to address the student's reading deficits (see Tr. pp. 298-99; see generally Dist. Ex. 6). While the district school psychologist attempted to explain that "intensive reading instruction" was "part" of the student's March 2015 ICT program recommendation (i.e., programmatic), this testimony starkly contrasts with the fact that the March 2014 IEP included a specific recommendation for multisensory reading instruction for the student in addition to the recommended ICT services (see Tr. p. 178; compare Dist. Ex. 4 at p. 308, with Dist. Ex. 6 at p. 312). She further testified that the student continued to need multisensory instruction at the time of the March 2015 CSE subcommittee meeting and that there "was no reason" to remove the service from the IEP (Tr. p. 184). As the student demonstrated progress with the multisensory reading instruction recommended in the March 2014 IEP, and continued to exhibit reading needs as of March 2015, the evidence in the hearing record supports the conclusion that the March 2015 CSE subcommittee's failure to recommend special education services to address the student's reading needs resulted in the district's failure to offer the student a FAPE for the 2015-16 school year.

One final note, however, on the issue of the student's needs in writing and attention. The March 2015 IEP indicated the student's stamina for writing had "improved greatly," as had his ability to express his thoughts in writing (Dist. Ex. 6 at p. 308). The March 2015 IEP also indicated the student benefited from writing supports (i.e., graphic organizers and discussions with the teacher) to assist him in organizing and structuring his written work and that, with support, the student was beginning to write multi-paragraph pieces (id.). According to the March 2015 IEP, at times the student did not spell reviewed words correctly while writing; however, he was much more successful spelling words in isolation (id.). The district school psychologist testified that at the March 2015 CSE subcommittee meeting, the student's teachers shared writing samples with the subcommittee that showed the different areas where the student made progress in writing, and in particular, with regard to the volume and organization of his writing (see Tr. pp. 330-31). The district special education teacher testified that the student's writing skills "definitely progressed" over the course of the 2014-15 school year, noting that at the start of the year his writing was "very simplistic" and became multisentence paragraph form later in the year (Tr. pp. 427-28; compare Dist. Ex. 58 at pp. 1, 4, with Dist Ex. 58 at pp. 2, 5, and Dist. Ex. 59 at pp. 295-96). To address

the student's continued needs in writing, the March 2015 CSE subcommittee, however, did not continue to recommend the use of pre-writing structures or the use of specialized paper, but instead, recommended the use of a graphic organizer and access to word prediction software compare Dist. Ex. 4 at p. 89, with Dist. Ex. 6 at p. 312). As for the student's attention needs, the March 2015 IEP noted that the student was working on maintaining attention to tasks in class, but he continued to require support in this area (see Dist. Ex. 6 at pp. 308-09). For example, the March 2015 IEP recorded that the student was "easily distracted by external and internal stimuli and need[ed] constant prompts to refocus throughout the day," but had developed better "impulse control with writing tasks" (id.). To address this area of need, the March 2015 IEP included an annual goal to improve the student's attention to tasks and assignments, and further included recommendations for refocusing and redirection throughout the day and clarifying directions (id. at pp. 310-12).

3. Related Services

The parents assert that the March 2015 IEP failed to include a recommendation for counseling services to address the student's social/emotional needs. However, a review of the evidence in the hearing record does not support the parents' assertion that the student required counseling services to be included on the March 2015 IEP in order to receive a FAPE.

As noted previously, the student continued to attend a social skills group in third grade—referred to as the "lunch bunch"—facilitated by the district school psychologist (Tr. pp. 34-36, 87, 314).[41] As a building-level service for both regular education and special education students, the "lunch bunch" specifically addressed the student's "interrupting" behavior, his ability to tell a story in an organized sequence, pragmatic language skills, and friendship skills during the 2014-15 school year (third grade) (Tr. pp. 35, 86-89, 314-15). The school district psychologist testified that the student regularly attended the "lunch bunch" group, appeared to be happy to be there, interacted well with the other students, readily shared and was open to receiving feedback and support, and, when necessary, spoke with her after the session about issues personal to him (see Tr. pp. 88, 304-05). Although the student's teachers shared with the district school psychologist incidents when the student was sad, she testified that "it was always related to something specific and not consistently part of his profile" (Tr. pp. 322-23). The district special education teacher testified that, throughout the 2014-15 school year, the student was "social;" "his friends were important to him;" and he enjoyed interacting, playing, and talking with peers (Tr. p. 352). The district special education teacher also testified that the student's social/emotional issues were "typical for a third grader," and neither she nor the regular education teacher had concerns that the student "needed more" support than what was provided to him "in the classroom and through [l]unch [b]unch" (Tr. pp. 499-500, 641-42, 656). Additionally, the district special education teacher testified that even if the student had other social/emotional problems, "it wasn't interfering with his . . . performance in class" (Tr. pp. 579-80). Similarly, the district regular education teacher testified that neither she nor the district special education observed any "signs of [the student] being overly anxious in the classroom" (Tr. p. 679). The district regular education teacher further testified that during the

[41] At the impartial hearing, the district school psychologist testified that the student began attending the "lunch bunch" group in second grade (2013-14 school year) due, in part, to needs identified through an administration of the Behavioral Assessment System for Children-Second Edition (BASC-2) in May 2013 as part of the student's initial evaluation, and due, in part, to the student demonstrating "a little bit of anxiety and rigidity" related to classroom functioning and academic material (Tr. p. 78; see Dist. Ex. 11 at p. 352, 358-61).

2014-15 school year, no one suggested to her that the student needed "special education support" to address his social/emotional functioning (Tr. p. 647).

Consistent with this information, the March 2015 IEP documented that the student enjoyed "working with other students in class" and "taking pictures and sharing them with others" (Dist. Ex. 6 at p. 308). Additionally, the March 2015 IEP reflected that the student "generally c[ame] to school each day with a smile," got along "well with many of the students in class," and "enjoy[ed] engaging in conversations with both the students in class and the teachers (id. at p. 309).[42] The March 2015 CSE subcommittee determined, therefore, that the student did not demonstrate any concerns related to his ability to interact appropriately with peers and teachers in the class, and did not recommend counseling services for the 2015-16 school year (id. at pp. 309, 312-13).

At the March 2015 CSE subcommittee meeting, both the student's regular education and special education teachers described him as a "happy, social boy who ha[d] friends and had maintained some solid friendships," and the district school psychologist testified that she received no reports from any other staff concerning the student's social/emotional functioning (Tr. pp. 103-04, 110-11; see Tr. pp. 509, 641).[43] In addition, the district school psychologist testified that her interactions with the student during the 2014-15 "lunch bunch" sessions "inform[ed] [her] opinion" as to whether the student needed counseling as a related service in the March 2015 IEP (Tr. pp. 304, 306). She testified that at the time of the March 2015 CSE subcommittee meeting, her opinion was that the student's social/emotional needs could be met through the "lunch bunch" social skills group, which was a "general education service" (Tr. pp. 111-12). Moreover, she further testified that neither the parents nor other March 2015 CSE subcommittee members advocated for the student to receive counseling as a related service in the IEP (see Tr. pp. 112-13, 305, 323, 508).

VII. Unilateral Placement—Applicable Standards

Having concluded that the district failed to offer the student a FAPE for the 2015-16 school year, the next inquiry is whether the parents' unilateral placement of the student at Windward for the 2015-16 school year was appropriate. As explained below, overall the evidence in the hearing record supports the IHO's conclusion that the parents sustained their burden to establish the appropriateness of Windward.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The

[42] Similarly, one year prior the March 2014 CSE subcommittee described the student in his IEP as a "friendly" and social child, who "developed positive peer relationships in school" (Dist. Ex. 4 at p. 86). Additionally, the March 2014 IEP reflected that the student enjoyed "playing and interacting with his peers," although at times, he "misinterpret[ed] the actions of others and then react[ed] based on the misconception[s]" (id.). Accordingly, the March 2014 CSE subcommittee did not identify any social/emotional needs exhibited by the student that required special education services (id. at p. 87).

[43] At the impartial hearing, the district school psychologist testified that the parents did not agree with that presentation of the student, and the district special education teacher testified that she and the parents discussed a "couple of things that occurred during the school year" related to the student's anxiety about State assessments and possibly school work (Tr. p. 111, 580-81).

private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]).

"Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006], quoting Rowley, 458 U.S. at 207 [identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115, citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "[e]vidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; see Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; see also Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

A. Specially Designed Instruction

The district contends that the parents failed to sustain their burden to establish the appropriateness of Windward due, in part, to the Windward witness's lack of "first-hand knowledge" of the student, the witness's "very limited" actual knowledge of the student, and the witness's ability to describe how Windward addressed the student's individual needs. In response, the parents argue that the hearing record is "robust" and contains more than sufficient evidence upon which to conclude that Windward was appropriate and offered individually tailored services to the student.

Consistent with the district's contentions, the parents presented one witness from Windward to provide testimonial evidence at the impartial hearing in support of their case. The parents proffered the Windward witness's direct testimony in an affidavit, and he appeared telephonically for cross-examination, redirect, and recross-examination testimony (see Tr. pp. 1333-1478; IHO Ex. I at pp. 1-15). At the impartial hearing, the Windward witness admitted that he first communicated with the parents in this case in connection with the student's most recent CSE meeting, held in May 2016 (see Tr. pp. 1259-60). Prior to the 2016 CSE meeting, he had "some familiarity with [the student] just in the course of doing the work [that he did]" (Tr. p. 1260). The Windward witness further admitted at the impartial hearing that while he had experience "interpreting standardized normed tests," he did not administer any of the assessments to the student documented in exhibit C attached to his affidavit, nor could he provide any information about who administered many of the assessments to the student or how the assessments were administered to the student (Tr. pp. 1270-72, 1338-47; see IHO Ex. I (C) at pp. 2-3). To further prepare for his testimony, the Windward witness reviewed evaluations and notes from the student's admissions team, as well as the student's progress reports submitted as an exhibit to his affidavit (see Tr. pp. 1267-69; IHO Ex. I(D) at pp. 3-11).[44]

At the impartial hearing, the Windward witness testified that approximately the first 38 paragraphs in his affidavit generally described the "Windward program," while the remaining portion of the affidavit dealt more specifically with the student in this case (see Tr. pp. 1257-59; compare IHO Ex. I at pp. 1-8, with IHO Ex. I at pp. 9-15).[45] For example, the beginning portion of the affidavit described the size and location of the school, the enrollment, the mission of the school, the profile of the students served at Windward, and staffing and teacher qualifications (see IHO Ex. I at pp. 1-4). Next, the affidavit described the curriculum and program, including the instructional methodology used (multisensory, language-based, direct, sequential and explicit); class sizes; the Orton-Gillingham, multisensory, language intensive reading program—PAF; differentiated instruction (homogeneously versus heterogeneously grouping students); the English language arts (ELA), mathematics, science, social studies, physical education, and specials programs; social/emotional support offered at Windward; and its afterschool program and

[44] The Windward witness played no role in the student's admissions process (see Tr. p. 1430). The witness also received information about the student's difficulties or progress through conversations with the student's teachers (see, e.g., Tr. pp. 1392-93, 1414-15, 1418-19, 1453-55).

[45] In addition, the witness testified that the substance of the information about the Windward program within the affidavit reflected information that he used when he was previously required to testify about the Windward program (see Tr. pp. 1257-58; IHO Ex. I at pp. 1-8). The witness's affidavit also attached as an exhibit "general information" about Windward printed from Windward's internet website (see generally IHO Ex. I(B)).

computer classes (id. at pp. 4-7). Finally, the affidavit described the teacher training at Windward, the use of standardized assessments in the admissions process, and students' interactions with typical peers (id. at pp. 7-9).

Next, while a review of the remaining portions of the Windward witness's affidavit did include information more specific to this student, much of this more specific information merely described the student within the general milieu offered to all students at Windward (see generally IHO Ex. I at pp. 11-15). For example, as part of the student's daily schedule, the student attended language arts in a classroom of nine total students, "all of whom have a language disability and at least average cognitive ability" (IHO Ex. I at p. 11; see IHO Ex. I(D) at pp. 3-10 [providing course descriptions of subjects applicable to all students at Windward]). Thus, while more specific to the total number of students in his language arts class, the witness's affidavit previously noted that "[c]lasses at Windward [were] typically in the 8-12 range" (IHO Ex. I at p. 7). According to the Windward witness's affidavit, the student was "grouped with students of similar reading, math and learning ability" in his language arts classroom (id. at p. 11). Yet, the affidavit previously explained that students were grouped "homogeneously based on skill development needs" for language arts and mathematics (id. at p. 7). The evidence further revealed that the student attended "three periods of language arts each day, including reading, writing, language skills, and study skills," and specifically, that the student received reading instruction during "these three periods" using PAF (id. at p. 11). Here, again, the witness attested previously that all students at Windward attend three periods of language arts each day, divided into one period for reading, one period for writing, and one period for skills (id. at p. 5). Instruction in language arts encompassed the following areas: classroom expectations, spelling, handwriting, decoding, reading comprehension, listening comprehension, written express (sentence level), and written express (paragraph level) (see IHO Ex. I(D) at pp. 4-5). The Windward witness attested that the student was "making progress in decoding and spelling," as well as in writing (IHO Ex. I at p. 11).[46] Finally, the affidavit reported that the student participated in a "'Ready Aloud Period'" for 15 minutes per day (Monday through Thursday) to "assist him with decoding" and that beginning in January 2016, the student spent "2 class periods per week with a private reading tutor" employed by Windward (id. at pp. 10-12; see Tr. pp. 1387-89 [explaining that the student received two 40-minute sessions per week of individual reading instruction to address decoding, spelling, and writing as his primary areas of need]).

Turning next to mathematics, the Windward witness's affidavit reported that the student received instruction one period each day in a classroom with a total of seven students (see IHO Ex. I at p. 12). Additionally, even with the relatively small class in place, the student received mathematics instruction taught in "small groups" (id.). Instruction in mathematics encompassed the following areas: classroom expectations, whole numbers, fractions and decimals, geometry, measurement and data, and problem solving (see IHO Ex. I(D) at pp. 6-7). The affidavit indicated that although the student "struggled in math," he was developing "his ability to solve problems, reason logically, and communicate using the language of mathematics" (IHO Ex. I at p. 12).

[46] The witness's affidavit included a copy of the student's daily schedule at Windward during the 2015-16 school year as an attached exhibit (see IHO Ex. I(E) at p. 2).

With regard to homework, the Windward witness's affidavit noted that similar to "many students at Windward," the student demonstrated "difficulties with homework" (IHO Ex. I at p. 14).[47] Here, the affidavit reflected that Windward supported the student by "describing specifically how to approach and help [the student] with homework," noting further that the student went home with his "assignments written in a planner for each subject" (id. at pp. 14-15).[48]

Finally, perhaps the most specific information about this student in the witness's affidavit indicated that he first enrolled at Windward for fourth grade in September 2015, and included a copy of the student's testing results from September 2015 upon his entry at Windward, which was provided as an exhibit attached to the affidavit (see IHO Ex. I at pp. 1, 8; see IHO Ex. I(C) at p. 2).

Based upon the foregoing, the district's concerns about the sufficiency of this evidence—namely, about the Windward witness's lack of overall knowledge about the student or how Windward met this student's needs versus how Windward met the needs of all Windward students—are well-taken. While sharing these concerns, some courts have recently deemed evidence about the general milieu of a unilateral placement sufficient, at the risk of interpreting the parents' burden to establish the appropriateness of a unilateral placement as little more than tripping hazard (see, e.g., T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]; W.A. v. Hendrick Hudson Cent. Sch. Dist., 2016 WL 6915271, at *26-*36 [S.D.N.Y. Nov. 23, 2016]), appearing to signal a retreat from whether, in fact, the parents demonstrated, as articulated in Gagliardo, that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).[49]

Nonetheless, on appeal the district's arguments ignore both the recent trend in case law as well as the fact that the parents' decision to unilaterally place the student at Windward did ameliorate a substantive deficiency of the March 2015 IEP: namely, Windward provided the student with a multisensory reading program—PAF—the same multisensory reading program the district used with the student during third grade in his ICT setting (Berger, 348 F.3d at 523 [indicating that a "unilateral placement cannot be regarded as 'proper under the Act' when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient"]). Therefore, while I do not specifically endorse the courts' recent

[47] Toward the end of January 2016, the student's mother reported to Windward that she "discontinued doing homework with [the student] because of the difficult dynamic" (Dist. Ex. 61 at p. 4). At the impartial hearing, the Windward witness testified that he "suspect[ed]" that this comment referred to "some difficulties in terms of interaction between the parent and child," since his impression was that the student got "his homework done consistently" (compare Dist. Ex. 61 at p. 4, with Tr. pp. 1413-14).

[48] The affidavit also reflected the Windward witness's classroom observations of the student during a language arts class and for a portion of a mathematics class (see IHO Ex. I at pp. 13-14). At the impartial hearing, he testified that he conducted the classroom observations of the student in late April 2016 for the specific purpose of "preparing" to testify in connection with the parents' "due process hearing," and he had never conducted any classroom observations of the student prior to that time (Tr. pp. 1266-67).

[49] Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

"general milieu" approach to the extent that it undermines the IDEA's objective a provide a program "tailored to meet the unique needs of a particular child," this type of approach to the evidence in this case would weigh more heavily in concluding, as did the IHO, that the parents sustained their burden to establish the appropriateness of Windward.

B. Progress

With regard to progress, the district argues that the Windward witness—as the sole witness presented from the unilateral placement—was not responsible for preparing the student's Windward progress reports and could not provide any specific information regarding the terms used to denote the student's alleged progress at Windward. As a result, the district contends that absent any information provided by the Windward witness assigning any meaning to the terms used in the progress reports, the Windward progress reports were "facially virtually meaningless." In response, the parents assert that progress reports, standardized assessments, and observations of the student all reflect the progress the student made at Windward in the areas of reading, writing, mathematics, and social/emotional needs.

Upon review, while the evidence in the hearing record tends to support the district's contentions, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, [2d Cir. Dec. 26, 2012]; L.K. v Northeast Sch. Dist., 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).[50] However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

The Windward witness's affidavit included copies of the student's Windward progress reports in each of the following subjects: homeroom, language arts, mathematics, social studies, science, art and music, and physical education (see IHO Ex. I(D) at pp. 3-11). Except for homeroom, the progress report for each individual subject included a general course description (id.). Additionally, while the progress report for each individual subject included numerical ratings

[50] The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

to reflect the student's progress in several areas for the months of November, February, April, and June (not yet completed), only those progress reports created for the student's participation in language arts and mathematics included an additional narrative description about this student's progress (id.).

Aside from the statements in the Windward witness's affidavit attesting to the fact that the student generally made progress in all of his subject areas, the witness's affidavit also included a specific section dedicated to describing the student's progress that narratively summarized portions of the information from the progress reports (compare IHO Ex. I at pp. 10-11, with IHO Ex. I at pp. 11-13 and IHO Ex. I(D) at pp. 4-11).[51] For example, with respect to language arts, the affidavit summarized what was reflected as the student's performance or progress—rated with the number "1," which corresponded to the descriptor of "[c]onsistently" on the progress report—in language arts, noting that in April 2016 the student was "consistently: completing his homework, spelling words with short vowels, spelling words with consonant blends, decoding words with short vowels, decoding words with consonant blends, decoding words with long vowels, understanding literal information and making logical inferences" (compare IHO Ex. I at p. 10, with IHO Ex. I(D) at pp. 4-5). The affidavit also noted that, in reading, the student "progressed to chapter books," and he read "more fluidly and with comprehension" (IHO Ex. I at p. 10). In addition, the affidavit noted that the student made "relevant inferences about the world around him and ma[de] relevant connections to both text and conversation" (id.).[52] Next, with respect to executive functions and attention, the Windward witness's affidavit indicated that the student made progress "from only occasionally following classroom routines and using time constructively in November 2015 to doing so consistently in April 2016" (id.).

At the impartial hearing, the Windward witness testified that—consistent with the district's contentions on appeal—he had no "knowledge as to what the meaning of the terms [were] as it relate[d] to providing markings" on the student's progress reports other than what was already listed on the progress reports (Tr. pp. 1374-75; see generally IHO Ex. I(D)). He further testified that he was not "aware of any source or any guidance document issued by the Windward School which inform[ed] staff as to" the meaning of the terms used in the progress reports (Tr. p. 1375). The Windward witness also played no role in preparing any of the student's progress reports, and he could not provide any information about the basis upon which a student was numerically rated within the progress reports (see Tr. pp. 1376, 1378).

Despite the district's concerns, however, a review the student's progress reports gives the impression that the student made progress if the numerical ratings for a particular skill or area declined across marking periods (i.e., from a "4," which corresponded from the descriptor of "[i]nfrequently," to a "3" ["[o]ccasionally"] or "2" ["[f]requently"] or "1" ["[c]onsistently]) (see

[51] At the impartial hearing, the Windward witness did, at times, supplement the information about the student's program and progress at Windward based upon conversations he had with the student's teachers in or around May 2016, which the witness engaged in in order to prepare for his testimony and for the student's annual review in May 2016 (see, e.g., Tr. pp. 1378-85, 1387-99, 1408-12, 1414-19, 1422-23, 1434-36, 1439-40, 1453-55, 1458-59, 1461-63).

[52] At the impartial hearing, the Windward witness testified that the students were not administered any "tests or quizzes" in language arts and referred to information in his affidavit to indicate how Windward generally assessed a student's progress in language arts (compare Tr. pp. 1390-92, with IHO Ex. I at pp. 7-8).

generally IHO Ex. I(D)). For example, in language arts, the student made progress in spelling words with short vowels because in November 2015 he received a "2," and by April 2016, he received a "1" (id. at p. 4). Perhaps of more concern, however, is that overall the student's Windward progress reports reflect very little, if any, progress from November 2015 through April 2016 in a majority of the skills or areas rated based upon Windward's proprietary marking system (see generally IHO Ex. I(D)). Here, in May 2015 when the parents first wrote to the district about the March 2015 IEP, the parents expressed concern and the student was not making "appropriate progress" (Dist. Ex. 42 at p. 144). Moreover, the student's rate of progress at the district was a predominant theme throughout the course of these proceedings (see generally Tr. pp. 1-2208; Dist. Exs. 1-52; 55-62; Parent Exs. A-M; O; R-U; W-Z; AA-DD; IHO Exs. I-XXXIII). In reviewing the Windward progress reports, most of the student's numerical ratings declined by only one number across all three marking periods from November 2015 through April 2016, or remained at the same numerical rating across all three marking periods (see generally IHO Ex. I(D) at pp. 4-11). In addition, although the witness's affidavit indicated that "teachers monitor[ed] progress through direct observation of student work, spelling dictations, word lists, comprehension exercises, writing activities, and math worksheets and class activities," as well as monitoring the student progress through "PAF program-based proficiency measures," the hearing record failed to include any such evidence (IHO Ex. I at pp. 7-8).

Next, the witness's affidavit pointed to the administration of both standardized and non-standardized assessments to the student Windward during the 2015-16 school year as evidence of progress (see IHO Ex. I at pp. 7-8; see generally Tr. pp. 1338-47). But Windward only administered the standardized assessments—the Stanford 10 Reading test, the Stanford 10 Math test, the Gates-MacGinitie Reading Test, and the Wide Range Achievement Test-Fourth Edition (WRAT-IV)—to the student on one occasion, which does not allow one to draw conclusions about the student's progress by comparing the student's scores across re-administrations of these assessments (see IHO Ex. I(E) at pp. 2-3).[53] To the extent that Windward also administered its own, non-standardized testing to the student during the 2015-16 school year—the Windward Coding Test: Reading (March 2015 and May 2016); and the Windward Coding Test: Spelling (September 2015 and May 2016)—the student's scores either increased or remained the same from the first administration of both tests to the re-administration of both tests (see IHO Ex. I(C) at p. 2; see also Tr. pp. 1344-47, 1443-50, 1467-75, 1477-78).

The parents also pointed to a June 2016 addendum to the student's privately obtained July 2014 neuropsychological evaluation as evidence of the student's progress and the appropriateness of Windward (see generally Parent Ex. DD). At the impartial hearing, the neuropsychologist testified that based upon the updated testing administered to the student in June 2016 related to the

[53] The March 2015 administration of the WRAT-IV to the student yielded the following standard scores: reading, 90 (2.0 grade equivalent); spelling, 80 (1.8 grade equivalent); and mathematics, 77 (2.2 grade equivalent) (see IHO Ex. I(C) at p. 3). Windward administered the WRAT-IV on March 2, 2015, prior to the student's annual review held on March 27, 2015 (compare IHO Ex. I(C) at p. 3, with Dist. Ex. 6 at p. 304).

reading, she was "not particularly happy with how they turned out" (Tr. pp. 1540-41).[54] She further testified that the testing results indicated that the student continued to "struggl[e] in terms of reading," even though additional testing (Comprehensive Test of Phonological Processing-Second Edition [CTOPP-2]) indicated he made "some progress" and that he understood "some of the phonological concepts" (id.).[55] The neuropsychological also testified that the student continued to demonstrate difficulty in the area of "rapid naming" skills and his "ability to get that information quickly" (id.). Based upon an administration of the Gray Oral Reading Test-Fifth Edition (GORT-V), the student's scores revealed continued difficulties in "spelling, in reading fluency, [and] in his oral reading," and the student "still operat[ed] far below grade level" (id.).[56] In summary, the neuropsychologist reported that the updated testing "highlighted" the student's continues areas of difficulty, "particularly in terms of his weak reading abilities and his need for ongoing intensive intervention" (Parent Ex. DD at p. 1). She also indicated that results from an administration of the Conners' Continuous Performance Test-II indicated that the student presented with a "significant attention problem[s]" (id. at p. 3).[57]

C. LRE

As a final attack on the appropriateness of Windward, the district asserts that Windward failed to provide the student with access to typically developing peers. The district also asserts that the hearing record lacked any evidence regarding the profiles of the other students with whom he attended academic classes or whether the student's academic or cognitive functioning levels were similar to the other students in his classes. Despite the fact that the evidence in the hearing record tends to support the district's argument, this factor, alone, does not warrant a finding that the parents failed to sustain their burden to establish the appropriateness of Windward.

Generally, although the restrictiveness of the parents' unilateral placement is a factor that may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S.,

[54] An administration of the Woodcock Johnson Tests of Achievement-Fourth Edition (WJ-IV ACH) to the student yielded the following standard scores: broad reading, 88 (21st percentile rank; 2.7 grade equivalent); word attack, 89 (23rd percentile; 2.5 grade equivalent); oral reading, 85 (16th percentile; 2.0 grade equivalent); sentence reading fluency, 86 (17th percentile; 2.6 grade equivalent); passage comprehension, 91 (27th percentile; 2.8 grade equivalent); and letter word identification, 89 (23rd percentile; 2.8 grade equivalent) (Parent Ex. DD at p. 2). In mathematics, the student achieved the following standard scores: broad math, 91 (28th percentile; 3.3 grade equivalent); calculation, 98 (46th percentile; 4.1 grade equivalent); applied problems, 95 (36th percentile; 3.6 grade equivalent); and math fluency, 85 (15th percentile; 2.6 grade equivalent) (id.). Finally, in language the student received the following standard scores: broad written language, 87 (19th percentile; 2.7 grade equivalent); spelling, 84 (14th percentile; 2.5 grade equivalent); writing samples, 98 (44th percentile; 3.7 grade equivalent); and sentence writing fluency, 81 (10th percentile; 2.2 grade equivalent) (id.).

[55] The CTOPP-2 results indicated the student achieved the following standard scores: phonological awareness, 98 (45th percentile rank); phonological memory, 82 (12th percentile rank); and rapid symbol naming, 76 (5th percentile rank) (see Parent Ex. DD at p. 2).

[56] The GORT-V yielded the following scaled scores: rate, 6 (9th percentile rank; 2.0 grade equivalent); accuracy, 6 (9th percentile rank; 1.7 grade equivalent); fluency, 6 (9th percentile rank; 2.0 grade equivalent); and comprehension, 6 (9th percentile rank; 2.7 grade equivalent) (see Parent Ex. DD at p. 3).

[57] Windward documents also reflected concerns about the student's attention and focus during the 2015-16 school year (see Dist. Ex. 61 at pp. 4, 6, 8-9).

231 F.3d at 105), parents are not as strictly held to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15; C.L., 744 F.3d at 837 [indicating that "while the restrictiveness of a private placement is a factor, by no means is it dispositive"]; D.D-S., 506 Fed. App'x at 82).

Overall, the hearing record contains very little evidence on this issue; however, the evidence it does contain strongly suggests that the student did not have any opportunities to interact with typically developing—or nondisabled—peers at Windward. For example, the witness attested that Windward served "students with language-based learning disabilities, including dyslexia," and that Windward's program was "organized to meet the needs of students with language-based learning disabilities" (IHO Ex. I at pp. 3, 8-9). Evidence in the hearing record also described Windward as a "special education school that serve[d] students of average to superior intellectual ability," noting however that not all Windward students "have been classified by the CSE" (id. at pp. 3, 8). The fact that some students have not been classified does not address the point of whether Windward generally admits regular education students who are nondisabled and would not meet the IDEA eligibility standards. With respect to this student, the witness's affidavit noted that he "interact[ed] with all peers," and further described Windward students as "very much like the students one would expect to find in a typical school setting " because students had "access to many of the same extra-curricular programs (e.g., afterschool activities, sports, drama, trips, clubs) that [were] available in a typical school setting" (id. at p. 8). Thus, while one could infer that the student had the opportunity to interact with peers who may not have been classified by a CSE, it does not necessarily follow that those peers were nondisabled when the remaining evidence reflects that Windward's program was specifically designed and organized to only serve students with language-based learning disabilities. Nonetheless, because parents are not as strictly held to the standard of placement in the LRE as are school districts, the district's argument on this factor does not preclude tuition reimbursement.

VIII. Equitable Considerations—Applicable Standards

Having concluded that Windward was an appropriate unilateral placement for the student for the 2015-16 school year was appropriate, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents

obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

The IDEA allows that reimbursement may be reduced or denied if parents did not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

A. Parent Cooperation

Here, the district argues that the IHO erred in finding that equitable considerations weighed in favor of the parents' request for tuition reimbursement as relief. The district contends that the parents did not cooperate with the CSE because they failed to articulate any objections to the March 2015 IEP "at a time that the CSE was able to make or consider changes." The district further contends that the parents "secretly contracted" with both Eagle Hill and Windward and failed to advise the district of their actions until the "contracts were signed and non-refundable monies paid out." Notwithstanding the student's progress in reading in the 2014-15 school year, the district asserts that evidence in the hearing record reveals that the parents had no intention of continuing the student's education in a district public school for the 2015-16 school year.[58] In response, the parents deny the district's assertions, and argue that the IHO's detailed analysis supported a finding that equitable considerations weighed in favor of an award of tuition reimbursement.[59]

A review of the evidence in the hearing record reveals, as the district argues, areas of concern when weighing the equitable considerations in this case. First, at the time of the March 2015 CSE subcommittee meeting, the parents had completed the student's admissions process for his attendance at Windward for the 2015-16 school year. For example, the parents submitted the

[58] To the extent that the district also points to the student's father's conduct—and "other incredible aspects" of his testimony—at the impartial hearing as additional factors to weigh as part of equitable considerations, the district does not point to any legal authority to support this principle.

[59] Without reference to any particular legal standard, the IHO's analysis of the equitable considerations in this case included factors of questionable relevance to such analysis: for example, whether the student's siblings continued to attend a district public school, whether the student's family life was without trauma, whether the parents' behaviors contributed to or exacerbated the student's difficulties, whether the parents were attentive to the student's homework, and whether the parents obtained outside services and evaluations of the student for which they did not seek reimbursement (see IHO Decision at pp. 12-13).

student's completed application to Windward in October 2014, they made the student available for testing at Windward as part of the admissions' process in early March 2015, the parents had been notified of the student's acceptance at Windward for the 2015-16 school year, and the parents executed a contract for the student's attendance for the student's attendance at Windward for the 2015-16 school year—as well as sending the first tuition payment—by March 16, 2015 (see Dist. Exs. 60 at pp. 10-12; 61 at p. 12; Parent Exs. Z at pp. 1, 8; AA at pp. 1-2; IHO Ex. I(C) at p. 3). At the impartial hearing, the parents testified that they did not advise or provide any information to the March 2015 CSE subcommittee regarding the executed Windward enrollment contract (see Tr. pp. 1175-78). Additionally, when the parents first informed the district at the end of May 2015 that they disagreed with the March 2015 IEP, they did not so inform the district of their actions taken with respect to the student's attendance at Windward for the 2015-16 school year (see Dist. Ex. 42 at p. 144). Instead, the parents waited nearly four months after the development of the March 2015 IEP and the completion of the student's admissions process to Windward to first notify the district of their intentions to unilaterally place the student at Windward via letter and to seek reimbursement for the costs of the student's tuition at Windward in a letter dated July 15, 2015 (see Dist. Ex. 44 at p. 146).

Second, and perhaps far more detrimental to weighing equitable considerations in the parents' favor, the parents rejected the district's offer to convene a CSE meeting at a mutually convenient date and time because, as noted by the parents, the district's "proposal of making any changes in September"—after they notified the district of their intentions to remove the student from the district—struck them as "simply an attempt to correct serious deficiencies, which [was] too little and too late" (Dist. Ex. 47 at p. 151). However, as noted, this statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Here, the parents' failure to cooperate with the district's offer to reconvene a CSE meeting is directly contrary purpose of the statutory provision. What is even more unfortunate is that the problems with the district's approach were readily redressible. The district had previously demonstrated the capacity to employ a multisensory reading program for with the student, and it was very same multisensory reading program used by the Windward (e.g. PAF) – a point that may very well have come out the if parents had been willing to meet with the CSE. Moreover, the evidence in the hearing record reflects that the parents' uncooperativeness with the district continued until February 1, 2016—after filing their due process complaint notice—when the parents finally granted the district consent to reevaluate the student in conformity with the district's regulatory obligation to do so (see Dist. Exs. 49 at p. 153; 50 at p. 154; 51 at p. 156; 61 at p. 24; Parent Ex. M at pp. 1, 3; see also Dist. Ex. 48 at p. 152).

Having considered the evidence in the hearing record in which both the district and the parents did not comply with their responsibilities and as a matter within in my discretion, the parents are entitled to reimbursement for 75 percent of the costs of the student's tuition at Windward for the 2015-16 school year based upon their lack of cooperation with the district from July 2015 through February 2016.

VII. Conclusion

Based on the foregoing, I find that the district failed to offer the student a FAPE during the 2015-16 school year, that the parents' unilateral placement of the student at Windward was

reasonably calculated to meet his educational needs, and that equitable considerations favored an award of reimbursement to the parent of 75 percent of the student's total tuition costs at Windward for the 2015-16 school year.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated October 19, 2016, is hereby modified to the extent that it ordered the district to reimburse the parents for the total costs of the student's tuition at Windward for the 2015-16 school year; and,

IT IS FURTHER ORDERED that the district is directed to reimburse the parents for 75 percent of the total costs of the student's tuition at Windward for the 2015-16 school year.

Dated: **Albany, New York**
January 20, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER